SIERRA CLUB

IBLA 80-937 Decided April 6, 1981

Appeal from a decision of the State Director, Utah State Office, Bureau of Land Management, denying a protest of boundary adjustments in wilderness study areas UT-050-236A and UT-050-236B.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Wilderness--Wilderness Act

> Sec. 603(a) of the Federal Land Policy and Management Act directs the Secretary to review those roadless areas of 5,000 acres or more and roadless islands of the public lands, identified during the inventory required by sec. 201(a) as having wilderness characteristics described in the Wilderness Act of Sept. 3, 1964, and from time to time report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness.

APPEARANCES: Linda Ranier, Esq., Sierra Club Legal Defense Fund, Inc., Denver, Colorado, for appellant; Dale D. Goble, Esq., U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Sierra Club appeals from a decision of the State Director, Utah State Office, Bureau of Land Management (BLM), dated May 22, 1980, denying appellant's protest of certain boundary adjustments by BLM in designating areas UT-050-236A and UT-050-236B wilderness study areas (WSA). 1/

1/ Sierra Club's standing to appeal this decision is clear. In its statement of reasons, Sierra Club alleges that its members use the

On February 15, 1980, the State Director published in the Federal Register a notice announcing his final decision to designate two wilderness study areas within the Dirty Devil River unit UT-050-236. 45 FR 10462. The lands affected by this decision are located adjacent to the Dirty Devil River in southeastern Utah, Ts. 28, 29, 30 S., Rs. 12, 13, 14, 15, 16 E., Salt Lake meridian. WSA UT-050-236A is approximately 61,000 acres in size, and WSA UT-050-236B is approximately 25,000 acres.

[1] The State Director's action was taken pursuant to section 603(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1976). That section directs the Secretary to review those roadless areas of 5,000 acres or more and roadless islands of the public lands which were identified during the inventory required by section 201(a) of the Act as having wilderness characteristics described in the Wilderness Act of September 3, 1964, 16 U.S.C. § 1131(c) (1976). Following review of an area or island, the Secretary shall from time to time report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness.

The wilderness characteristics alluded to in section 603(a) are defined in section 2(c) of the Wilderness Act, 16 U.S.C. § 1131(c) (1976):

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

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fn.1 (continued)
lands at issue for hiking, photography, and other forms of recreation. Appellant further alleges that its members have participated in public hearings, attended field trips, and sponsored educational outings related to the roadless areas discussed herein. The requirements for standing enunciated in California Association of Four Wheel Drive Clubs, 30 IBLA 383 (1977), are satisfied.

The review process undertaken by the State Office pursuant to section 603(a) has been divided into three phases by BLM: Inventory, study, and reporting. The State Director's decision of February 6, 1980, published at 45 FR 10462, marks the end of the inventory phase of the review process and the beginning of the study phase.

Sierra Club's protest and appeal focus upon an adjustment to the boundaries of an earlier proposed WSA. This proposed WSA was an area of some 90,000 acres. Following publication of the boundaries of this proposed WSA on April 12, 1979, 44 FR 21898, a public meeting was held and a 60-day comment period was allowed to obtain public reaction. As a result of public comments, the size of the original proposal was reduced to 61,000 acres (UT-050-236A) by the exclusion of Sams Mesa from the proposed WSA. Also as a result of comments, an area including French Spring Canyon and the main fork of Happy Canyon was reevaluated and found to possess wilderness characteristics. This latter area of some 25,000 acres bears the designation UT-050-236B.

In its protest, Sierra Club charged that BLM's boundary adjustment violated Organic Act Directive (OAD) No. 78-61, Changes 2 and 3, because the boundaries of UT-050-236A did not extend to manmade intrusions. 2/ Instead, Sierra Club pointed out, the WSA boundary follows canyon rims, State and National Park Service boundaries, and canyon crossings. A similar charge was made with respect to area UT-050-236B.

BLM responded to Sierra Club's charge by pointing out that OAD 78-61, Changes 2 and 3, had not yet been received by the time BLM published its proposed WSA boundaries for UT-050-236 on April 12, 1979. Adjustments to these proposed boundaries, BLM maintains, were later made in accordance with this OAD. As evidence, BLM points to the adjusted southern boundary of UT-050-236A. This boundary, according to the State Director, is a pre-FLPMA road up Sams Mesa Box Canyon to State-owned sec. 16, T. 30 S., R. 14 E., thence around State-owned sec. 16 to

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2/ Organic Act Directive No. 78-61, Change 2, was published on June 28, 1979. It states in part: "When a boundary adjustment is made due to imprints of man, the boundary should be relocated on the physical edge of the imprint of man. When this is not possible, the boundary should be a legal description. In this case, the boundary must eliminate the imprint of man and as little adjacent land as possible" (p. 5). Organic Act Directive No. 78-61, Change 3, published July 12, 1979, contains the following language:

"There may be unusual cases where due to configuration it may be appropriate to consider adjusting the boundary based on the outstanding opportunity criterion. * * * Very good judgment will be required in locating boundaries under such conditions so as to exclude only the minimum appropriate land. Such boundary adjustments are not permissible if the land in question possesses an outstanding opportunity for primitive and unconfined recreation." (Emphasis in original.)
(p. 3).

another pre-FLPMA road extending to State-owned sec. 16, T. 30 S., R. 15 E.

The State Director further points out that the boundaries of area UT-050-236B are 18 miles of roads, 14 miles of boundaries in common with the Glen Canyon National Recreation Area, and 2 miles corresponding to the west township line of T. 30 S., R. 15 E. The 2 miles corresponding to the west township line, in the State Director's view, serve as an approximate boundary of the area's naturalness characteristics.

Sierra Club's protest further charged that the western portion of an area known as The Big Ridge should be included in the Dirty Devil WSA as outstanding opportunities for hiking, camping, photography, and wildlife observation exist therein. BLM's response to this charge was to point out that pre-FLPMA roads separate The Big Ridge from both area UT-050-236A and UT-050-236B.

The final contention of Sierra Club's protest of March 15, 1980, is the charge that the Dirty Devil WSA should include certain areas intruded upon by the Cotter Corporation after FLPMA's passage on October 21, 1976. The areas affected by Cotter, according to appellant, include the top of Sams Mesa and the Dirty Devil Canyon from its junction with Happy Canyon up into Sams Mesa Box Canyon.

BLM's response of May 22, 1980, acknowledges the presence of roads constructed after FLPMA's passage in Dirty Devil Canyon, Twin Corral Box Canyon, and Sams Mesa Box Canyon. Contrary to appellant's contention, however, BLM maintains that the post-FLPMA roads in these areas were included within WSA UT-050-236A. Newly constructed roads are properly included within the WSA, according to the State Director, and must be returned to a substantially unnoticeable condition by the time the Secretary recommends an area as suitable (or unsuitable) for wilderness preservation.

On appeal, Sierra Club restates many of its protest arguments in slightly different form. In arguing that Sams Mesa should be included in further wilderness review, appellant maintains that the southern boundary of UT-050-236 is an artificial line from the Dirty Devil River to State-owned sec. 16 and then follows a post-FLPMA road along Sams Mesa Box. From Sams Mesa Box, counsel continues, the boundary follows the rim of Sams Mesa, miles from any manmade intrusions.

In his response to Sierra Club's protest, the State Director wrote that the southern boundary of UT-050-236A is a pre-FLPMA road up Sams Mesa Box Canyon to State-owned sec. 16, T. 30 S., R. 14 E., around the State section, then along another pre-FLPMA road extending to State-owned sec. 16, T. 30 S., R. 15 E. Appellant argues on appeal that this statement of the State Director is contradicted by his subsequent acknowledgment of post-FLPMA roads within the WSA, notably in Dirty Devil Canyon, Twin Corral Box Canyon, and Sams Mesa Box Canyon. Such an argument would cast doubt on the nature of the southern boundary of

UT-050-236A if there were only one road up Sams Mesa Box Canyon. There are, however, more than one. See appellant's exhibit 1. The State Director's acknowledgment of post-FLPMA roads does not necessarily imply that that portion of the southern boundary following a road up Sams Mesa is of post-FLPMA origin. Appellant has failed to establish error in the State Director's decision with respect to the southern boundary of UT-050-236A.

Appellant's argument in favor of inclusion of The Big Ridge in a WSA focuses upon the State Director's decision of February 6, 1980, which divided a single proposed WSA into the two units now designated UT-050-236A and UT-050-236B. Appellant contends that the wilderness integrity of unit UT-050-236 was compromised when The Big Ridge was excluded from further wilderness review. Such a compromise, appellant maintains, is prohibited by the Wilderness Inventory Handbook published by BLM: "Inventory units may be divided or grouped to accommodate local circumstances or conditions as long as all of the qualifying area is inventoried and the wilderness integrity is not compromised" (Wilderness Inventory Handbook, Sept. 27, 1978, p. 10).

Sierra Club directs our attention also to OAD 78-61, Change 2, in further support of its argument that the division of unit UT-050-236 into UT-050-236A and UT-050-236B caused The Big Ridge to be excluded from further wilderness review:

> The division of roadless areas into two or more units may only be done in exceptional situations and is acceptable only if the integrity of the wilderness characteristics contained within the area are [sic] not compromised and where such a division will not affect the final decision of whether wilderness characteristics are present in any portion of the roadless area. [Emphasis in original.]

(OAD 78-61, Change 2, June 28, 1979, p. 8).

Sierra Club's argument with respect to The Big Ridge is unpersuasive for two reasons. First, the guidance offered by the above-quoted OAD 78-61, Change 2, applies to roadless areas. The State Director has previously mentioned, and appellant acknowledges in its brief, the existence of pre-FLPMA roads in Happy Canyon. These roads, BLM points out, separate UT-050-236A and UT-050-236B from The Big Ridge.

Secondly, the division of the proposed WSA by the State Director on February 6, 1980, had no effect on whether The Big Ridge was considered for further wilderness review. Under both the proposed WSA boundaries, published at 44 FR 21898, 21899 (Apr. 12, 1979), and the final WSA boundaries, The Big Ridge was excluded from further wilderness review. Appellant's argument, based on BLM's alleged irregularities in dividing the proposed WSA, is unpersuasive, lacking a causal relationship between the alleged irregularities and the exclusion of The Big Ridge from further wilderness review.

Appellant's final argument on appeal is the charge that post-FLPMA roads were the basis for the exclusion of Sams Mesa and the southwest portion of Dirty Devil Canyon from further wilderness review. In support of this argument, appellant points to exhibit 1, a topographic map of the inventory unit, showing post-FLPMA improvements in Sams Mesa. Appellant argues that construction by the Cotter Corporation of roads, drill pads, and aircraft landing areas without BLM review and approval was illegal. It refers to BLM's efforts to enjoin Cotter from further construction on Federal land. United States v. Cotter Corp., No. 79-0307 (D. Utah Oct. 1, 1979).

This final argument brings to light the fact that Sams Mesa was, as of April 12, 1979, the date of BLM's publication of the boundaries of its proposed WSA, included within this proposed WSA. 44 FR 21898 (Apr. 12, 1979). BLM's subsequent exclusion of Sams Mesa from further wilderness review was attributed to "public comments." From this sketchy explanation, it is difficult to understand BLM's rationale for exclusion of Sams Mesa and the southwest portion of Dirty Devil Canyon. What is reasonably clear, however, is that such areas were not disqualified from further wilderness review by their post-FLPMA intrusions.

The State Director's response to appellant's protest contains the following language: "The roads, newly constructed after October 21, 1976, or post-FLPMA, are included within the WSA, notable [sic] in Dirty Devil Canyon, Twin Corral Box Canyon, and Sam's Mesa Box Canyon." (Emphasis in original.) Correspondence in the file from the State Director to the Six County Commissioners Organization, a second protestant, provides additional insight into the State Director's view of post-FLPMA construction.

> While it is true that there are roads within the proposed WSA, namely in Twin Corral Box Canyon, Sams Mesa Box Canyon, and in the Dirty Devil Canyon, it should be noted that these roads were unauthorized and constructed after October 21, 1976, the date that FLPMA was passed by Congress. Unauthorized activities which have taken place after the passage of FLPMA do not disqualify an area from WSA status. This is in accordance with the IMP [Interim Management Policy and Guidelines for Lands Under Wilderness Review (Dec. 12, 1979) 3/], published in December of 1979.

3/ On November 7, 1980, Judge Ewing T. Kerr, U.S. District Judge for the District of Wyoming, found Solicitor's Opinion, M-36910 (Sept. 5, 1978), 86 I.D. 89 (1978), to be clearly erroneous. This opinion by Solicitor Krulitz addressed land management policies during the period in which land is under review for wilderness designation. The "Interim Management Policy and Guidelines for Lands Under Wilderness Review" was criticized as issued in harmony with the Solicitor's opinion. Rocky Mountain Oil and Gas Association v. Andrus, No. C78-265K (D. Wyo. Nov. 7, 1980) (order granting motion for summary judgment).

> This policy preserves Congress' right to exercise its discretion to designate any area as wilderness and is necessary so that areas are not disqualified by inadvertent or purposefully created impacts in areas that contained wilderness characteristics at the time FLPMA was enacted.

(Letter of May 27, 1980, p. 2; file 8500 (U 931)).

Further examination of correspondence suggests a rationale for exclusion of Sams Mesa from further wilderness review. In a response to the Utah Wilderness Association, yet another protestant, the State Director wrote:

> Should you review the notice printed in the Federal Register, February 15, 1980, and the public information packet, you will note that Twin Corral Box Canyon and Sams Mesa Box Canyon (both containing post-FLPMA roads) have been included in the WSA. Both the southern half of Sams Mesa and much of Happy Canyon have been heavily intruded by pre-FLPMA roads, airstrips, etc. The unintruded portion of Sams Mesa, that part north of the road from Twin Corral Flat to Section 16, T. 30 S., R. 14 E., has been included in the WSA. [Emphasis added.]

(Letter of May 27, 1980, p. 2; file 8500 (U 931)).

The above correspondence provides a measure of clarity to BLM's actions and the motivation therefor. A decision of the State Director will not be disturbed on appeal where the appellant fails to meet its burden of pointing out specific errors of law or fact in the decision below. Appellant has not met this burden of showing error in BLM's decision of May 22, 1980. Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Director is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

James L. Burski
Administrative Judge